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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 313.

GEORGE W. GREEN ET AL., PETITIONERS,
VS.
CITY OF STUART, FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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CITY OF STUART, FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioners George W. Green, Newport Culvert Company, a Kentucky Corporation, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser, Mary M. Gosling and George W. Van Slyck, as executor of the estate of B. N. Douglass, deceased, severally petition for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a final judgment entered by said court on April 29th, 1943, affirming final judgment of the United States District Court for the Southern District of Florida, petition for rehearing in said Circuit Court of Appeals having been denied May 31st, 1943. The opinion and judgment of said Fifth Circuit Court of Appeals is reported as *Green et al.* v. *City of Stuart*, 135 F. 2d 33. Petitioners in support of this their petition respectfully further show unto the court:

STATEMENT OF MATTERS INVOLVED.

The proceeding in the courts below was a petition by the City of Stuart for the confirmation of a plan of composition of part of its debts in alleged pursuance of Chapter 9 of the Bankruptcy Act, 11 U. S. C. A., Secs. 401 to 403. The city's petition (R. 9) attempted to present a plan for the composition of debts

"which it desires to affect by such plan."

The proposal therefore was a restrictive plan which, as we shall later see, was for the benefit of the "inside few." The "plan" was identified as "Exhibit A" to the petition. A description of the debts to be affected as "Exhibit B." A list of consenting creditors as "Exhibit C" and an alleged list of all known creditors as "Exhibit D." The petition alleged that the plan was fair and equitable. That, if affirmed, taxpayers would be able to pay the amounts levied to service the proposed refunding bonds and that the petition was filed in good faith.

The plan "Exhibit A" beginning R. 13 described the debts to be affected as (1) all outstanding bonds. (2) All accrued and unpaid interest on the bonds. (3) All judgments or which *ad valorem* taxes had to be levied. All the bonds described in the plan were however not of the same class because a large part thereof constituted street improvement bonds based on statutes such as Chapter 6864, Laws of Florida, 1915, Sec. 3016, C. G. L., and Chapter 9298, Laws of Florida, 1923, Secs. 3022, *et seq.*, C. G. L., providing for special assessment funds to liquidate such bonds in addition to making them general obligations of the city.

Section 2 of the plan pledged the full faith and credit of the city and a "sufficient *ad valorem* tax to provide therefor on all property within said city subject to taxation." No showing is made either by the petition or the

plan as to what was considered property within the city subject to taxation as a result of the decision of the Supreme Court of Florida in the case of *State ex rel. Davis* v. *City of Stuart,* 97 Fla. 69, 120 So. 335. The record in the companion case of *Selser* v. *City of Stuart,* now before the court on petition for certiorari and reported 135 F. 2d 211, shows that the city officers did not know and do not know what property is legally within the city and subject to taxation.

Section 3 of the plan provided for exchanging old bonds for refunding bonds par for par. Also to issue new refunding bonds for accrued interest which had accumulated during a period of about 16 years default. Thus the face amount of the proposed refunding bonds was to greatly exceed the face amount of the outstanding bonds and bonds issued for accrued interest would draw interest, whereas coupons representing past due interest did not draw such interest.

Section 4 of the plan provided for a rapidly ascending scale of interest rates starting at 1% up to 5% but that section of the plan has to be considered with Section 6(F) (R. 18) where it is provided that

> "in the event of a failure or refusal of the governing authorities of the city to perform any of the obligations assumed hereunder * * * or upon a default in the payment of interest on said refunding bonds"

then at the option of the holders of 25% in amount of outstanding refunding bonds interest rates would all revert to the original 6% basis. Such defaults were inevitable for a city which had not been able to pay any interest for 16 years and whose indebtedness was not being decreased.

Section 6 of the plan (beginning R. 16) undertook to bind the city with sundry obligations providing generally for the prompt and exclusive payment of the proposed refunding bonds. Subsection (B) set out the scale of

budgetary levies for respective periods and for the optional use of $10,000 per year from sources other than *ad valorem* taxes.

Section 7 of the plan made it mandatory on the part of the city to use and absorb all surplus funds it might obtain for the purchase of refunding bonds to be issued pursuant to the plan.

Section 8(A) of the plan (R. 21) provided that all delinquent taxes and all delinquent special assessments for the year 1941 and prior years might be settled and adjusted on any basis approved by the city and that the proceeds of such settlements:

> "shall be paid into a special fund which will not be amenable to any execution by any creditor of the city"

but will be used by the city for improvements or

> "for the purpose of purchasing refunding bonds"

at specified percentages for four successive six-months periods. Subsection (B) of Section 8 of the plan then provided that the right to tender refunding bonds was open to all creditors meaning of course creditors who held refunding bonds and that to insure a supply of refunding bonds sufficient to absorb the proceeds of settled delinquent taxes and special assessments Thomas M. Cook & Company (later shown to be merely an individual and fiscal agent for the city) would make available not to exceed $100,000 of refunding bonds for such purposes. Such diversion of delinquent taxes and delinquent special assessments to the exclusive benefit of refunding bonds to be issued under the plan created a gross inequality as applied to other creditors equally entitled to payment from that source directly contrary to the principles announced by this court in the *Avon Park case*, 311 U. S. 158, 136 A. L. R. 870.

Paragraph 9 of the plan (R. 22) set forth that Thomas M. Cook & Company, not incorporated, was a bond investment firm and creditor of the city and that he

> "has agreed with the City to render such technical and other services, and to advance funds necessary to consummate the following steps incidental to the refunding program."

The things Cook was to do are then listed as 1 to 8 inclusive. All this he was to do "at no expense to the city" but he was to be reimbursed

> "by receiving from creditors exchanging refunding bonds hereunder a sum of Twenty ($20) Dollars per $1,000 Refunding Bond delivered."

Section 8(B), page R. 22, recited that said Cook was to make available $100,000 of refunding bonds, thus indicating the extent to which he was already the owner of outstanding bonds and a creditor of the city in that behalf. Therefore Section 9 of the plan proposed to give Cook who was to render all the supposed services the inside advantage by allowing him to charge other creditors $20 a thousand on their bonds exchanged. Thus again the plan violated the principles laid down in the Avon Park case.

Exhibit C, alleged (R. 10) to be a list of consenting creditors to petitioner's plan appears (R. 26 to 64). That list included American Surety Company (R. 26), a judgment creditor, for $15,860.68. Also M. J. Bowerman (R. 30-31), a judgment creditor, for $29,307.17. Also R. E. Crummer (R. 32 to 36), a holder of all classes of bonds issued by the city including street improvement bonds issued under Chapter 6865, Laws of Florida, 1915, and issued under Chapter 9298, Laws of Florida, 1923, aggregating for principal $187,500, for coupons $64,390 and for other interest $21,914.49, totalling $274,059.49. Also R. E. Crummer & Company (R. 38-39), a holder of bonds and coupons for $56,548.32. Also J. Leo Gleason (R. 43 to 46), coupons $40,860 and coupons $15,570. Also E. W. Jackson (49-50),

bonds $70,500, coupons $35,678.69, other interests $2,570, totalling $108,748.69.

Exhibit D, alleged in the petition (R. 10) to be a list of "all known creditors" of the city, appears R. 65 to 75. That list includes (R. 65) American Surety Company as a judgment creditor. Also M. J. Bowerman as a judgment creditor. But the list does not include the petitioner Green as a creditor nor does it include sundry other creditors then suing the city as shown by the city's application for temporary injunction against pending actions (R. 209-210).

Petitioner George W. Green filed his claim (R. 83 to 85) setting up a general indebtedness against the city in the sum of $29,168.06. That said indebtedness had been ratified by the city under resolution of March 1st, 1929, and was then ratified by the Legislature by the passage of Chapter 14407, Laws of Florida, 1929, and was then ratified by the decision of the Fifth Circuit Court of Appeals in the case of *Green* v. *City of Stuart*, reported 81 F. 2d 968. That decision was rendered in March, 1936. Thus the unequivocal showing made by the claim is that the indebtedness due to petitioner Green was a general obligation of the city entitling him to the levy of general *ad valorem* taxes to liquidate the same. Green then filed a set of interrogatories addressed to the Mayor of the City of Stuart (R. 87 to 91) seeking to develop relations between the city and Thomas M. Cook mentioned in the petition for composition. On the same day petitioner Green filed his answer (R. 92 to 108) challenging the petition for composition in many respects. First, that the petition did not plead the conditions precedent required by 11 U. S. C. A., Sec. 403. Second, that the plan submitted by the city was in fact a plan of its fiscal agent Thomas M. Cook "or his relative R. E. Crummer." Third, that the list attached to the petition did not include the claim of defendant Green or the claims of many other creditors of the city. Fourth, that 62% of the creditors had not accepted the plan if securities owned or controlled by the city or

its fiscal agent be excluded. Sixth, that the plan was not fair and equitable either to creditors or taxpayers and that the city would not be able to service the new securities if issued. Seventh, that the plan was not in good faith.

It is then shown in paragraph VIII that the city authorities had previously adopted a plan, copy of which is attached as Exhibit A to the answer.

> "That one R. E. Crummer was attempting through his relative Thomas M. Cook, to be fiscal agent for said petitioner and that said Cook represented to said committee (for the prior plan, Exhibit A) that he owned or controlled more than 50% of outstanding indebtedness of the petitioner."

In short that Cook and Crummer and Crummer's company R. E. Crummer & Company, interfered and prevented the carrying out of the prior plan worked out by a committee of representative citizens which would have resulted in a composition of the city's debts for the sum of $500,000 less than under the Cook-Crummer plan set up in the city's petition for composition. Besides which the pretended fiscal agent Cook was being allowed to earn a large fee from other creditors whose debts were to be refunded.

In paragraph C of Section VIII of the same answer (R. 95-96) it is further pointed out that the Selser suit was pending to determine what lands might be liable for taxes to liquidate the proposed new bonds and that unless the larger territory could be subjected to such obligations the new obligations would soon again be in default and put the city at the mercy of the fiscal agent and his relative Crummer. That no reason existed why the fiscal agent Cook should be allowed to speculate on the obligations of the city or be allowed to charge other creditors large fees for making exchange of bonds. Also that no reason was shown why the city should issue new securities for a half million dollars more in amount than un-

der a prior acceptable plan. Copy of the prior acceptable plan is then attached as Exhibit A (R. 98 to 109).

The petitioner Newport Culvert Company filed its claim as a creditor to the extent of $17,212.46 (R. 110 to 126) showing that it also was entitled to have the city pay the same from a general levy of *ad valorem* taxes. Answer of the same company was filed (R. 127 to 132) challenging the petition of the city in sundry respects similar to answer of Green.

Petitioner Robert M. Turner filed a petition to intervene as a taxpayer owning property within the city proper (R. 134 to 137) claiming that the proposed city plan would not be fair and equitable to taxpayers such as he.

Counsel for these several creditors and tax payers on July 25th, 1942, filed a set of interrogatories addressed to Thomas M. Cook, fiscal agent, and from those interrogatories information was sought as to whether J. Leo Gleason and E. W. Jackson were employees of said Thomas M. Cook, fiscal agent. These were very material inquiries because those two parties claimed to own large amounts of coupons and bonds and they were listed as alleged assenting creditors. The interrogatories also sought to develop the relations between Cook and Crummer and between Cook and R. E. Crummer & Company. Counsel for the city moved to strike the claim and answer of petitioner Green (R. 144). Likewise they moved to strike the claim of Newport Culvert Company and its answer (R. 146). Also to strike the petition and answer of Robert E. Turner (R. 148). No notice however was ever given to Carroll Dunscombe, attorney of record for those parties of any hearing upon those motions to strike. Prior thereto the court had made an order on June 18th, 1942 (R. 76 to 79), providing for the hearing on the petition of the city October 5th, 1942, and directing publication of notice. At R. 83 is an affidavit by the city clerk to the effect that the notice defined by the order (R. 79) was

mailed to creditors. Then a motion was made (R. 81) to change the return date to September 14th and an order was made to that effect (R. 82). The place for the return was designated as Miami, Florida. Nevertheless an *ex parte* hearing without notice was held before the Honorable William J. Barker, Judge of the Tampa Division, at Tampa, Florida, on the 18th day of September, 1942, at which time and place he made the interlocutory decree now appearing R. 155 to 163 which struck the claim and answer of petitioner Green, the claim and answer of Newport Culvert Company, the petition and answer of Robert M. Turner and the basis of the order was that the claims of said parties are not materially affected by the plan of composition. The order then proceeds (R. 156, 157) to say that the court had considered evidence and had examined contracts, proposals and what not, and then makes "findings of fact." The only matters in the record as constituting any sort of evidence was an *ex parte* affidavit of L. B. Eurit (R. 150, 152) as city clerk, sworn to September 16th, 1942, and filed September 18th, 1942, undertaking to state certain facts as to the indebtedness of the city and its tax assessed valuations. Also an *ex parte* affidavit by Thomas M. Cook (R. 152 to 155) sworn to September 16th, 1942, and filed September 18th, 1942. So it is that all of the claims and answers filed by the petitioners up to that time were swept out and none of the interrogatories propounded to Cook were answered and the court proceeded to enter up a decree upon said *ex parte* affidavits of the said clerk and of the fiscal agent Cook. The findings of fact among other things (R. 158) stated:

> "None of the claims owned, held or controlled by Thomas M. Cook & Company, *which have been voted in the plan*, are controlled by the petitioner within the meaning of the Bankruptcy Act" (Italics ours).

Cook was not listed by the city's petition as being a creditor, yet the decree finds that he voted claims for the plan.

Paragraph K of the findings (R. 159 to 160) recites that Cook was a creditor of the city and had made a guarantee of $100,000 of bonds which might be available for purchase by the city. Yet in the same paragraph it was found that Cook was to be allowed a fee of 2% or $20 on each $1,000 of bonds exchanged by other creditors for ratable portions of outstanding bonds. In other words, Cook as the fiscal agent and as a creditor was to be given that advantage over other creditors. Paragraph F (R. 161) found that none of the claims owned, held or controlled by Cook

> "which have voted in the plan are controlled by the petition within the meaning of the Bankruptcy Act."

After the entry of the *ex parte* decree above mentioned petitioner A. T. Van Tassel on October 9th, 1942, filed a petition for leave to intervene (See his petition, R. 163 to 169). That petition set up that Van Tassel was a resident taxpayer and that it was illegal for the commissioners to delegate their authorities to a fiscal agent such as Thomas M. Cook. He also insisted that the composition plan as per copy attached to the former answer of George W. Green was much more favorable to taxpayers and had been consented to by two-thirds of the *bona fide* creditors affected. It is also set up (R. 164) that after that plan was so consented to the city commission entered into a void contract with Thomas M. Cook trading as Thomas M. Cook & Company

> "and who in fact is a representative of R. E. Crummer & Company, a foreign corporation that speculates in defaulted municipal bonds."

Copy of the fiscal agency contract is then attached as part of the petition. It is then set up that the contract was not disclosed to the court as required by law. The *ex parte* affidavit of Cook filed at Tampa September 18th, 1942 (R. 153), referred to his contract as Exhibit 1, being attached to the affidavit, but the affidavit as copied in

the record carried no copy of the contract. Therefore it was put into the record as part of the petition of Van Tassel. The Van Tassel petition (R. 164) then charges that the fiscal agency contract included all the vices condemned by this court in the Avon Park case. It is then charged

> "That the bulk of the consents filed to this plan are those of the fiscal agent or controlled by him or R. E. Crummer & Company."

It is thus specifically charged that the fiscal agency contract made with Thomas M. Cook was a subterfuge on the part of R. E. Crummer & Company to get round some of the restrictions defined by this court in the Avon Park case. Numerous other objections to the contract are pointed out in sections 8 to 11 of the Van Tassel petition and same was sworn to by Carroll Dunscombe as attorney for Van Tassel.

The fiscal agency contract was embodied in resolution No. 293 passed by the city commission and it appears R. 167 to 177. Many of the features of the agency contract are the same as the proposed plan identified as Exhibit A to the petition, so much so that we must infer that the fiscal agent and his kinsman R. E. Crummer were the authors of the plan proposed to the court. Section 5 of the contract (R. 170-171) includes practically the whole of section D of the plan (R. 16-17), but it carries also another very significant sentence not found in the plan. See sentence beginning middle R. 171 which provides that the city shall from the first moneys collected out of the levy for the refunding bonds set aside sufficient moneys for the payment of interest on refunding bonds and that the sinking fund so created

> "for said issue of refunding bonds shall be kept separate and shall not be co-mingled with other funds."

This was an effort to ear-mark all of the funds that might come in from the annual levies made to service the re-

funding bonds. The scheme was to create a preference in favor of the refunding bonds to the exclusion of other creditors because, as the petition of Van Tassel and other interveners showed, the city would not have the ability to carry the load for the refunding bonds much less for other creditors.

A part of section 3 of the contract (R. 172) is substantially the same as section F of the plan (R. 18) providing that on failure to perform any of the obligations assumed by the city to holders of refunding bonds or upon default in the payment of interest then the holders of 25% in the principal amount of refunding bonds should have the option to such holders respectively to cause the interest on their bonds to revert to the original rate of 6%. This would in effect give Cook and Crummer absolute domination over the fiscal affairs of the city because they held more than the requisite 25%.

Section 7 of the agency contract (R. 173-174) specifically authorized Cook

> "to buy and sell bonds and coupons of the City of Stuart, Florida, or judgments rendered thereon, all of which might be the subject of this proceeding, at any time satisfactory to the first party (Cook) and to the holders of such above mentioned obligations."

Cook is then authorized to extend to the holders of such obligations the right

> "to voluntarily sell all or any part of their past due coupons or claims for past due interest"

to Cook at 25% of par. In the same section the city is given the option for a period of 30 days to buy what Cook may thus acquire on the same basis, namely 25%, but Cook well knew that the city, then in default for 15 years on the payment of interest, would have no funds with which to exercise the option unless the city secured them through the adjustments of delinquent taxes as per

section 10 of the contract (R. 175) and adjustments of special assessments as per section 8-A of the plan (R. 21). Therefore the contract boldly undertook to vest in Cook, the fiscal agent of the city, the right to speculate in the city's debts, all of which was directly contrary to the decision of this court in the Avon Park case. Such specific authority to speculate in the obligations of the city did not appear in the proposed plan attached to the city's petition for composition. The interlocutory decree as we have seen specifically finds in paragraphs (e) and (k) (R. 158-159) that Cook was a large creditor of the city and voted his claims for the plan. Therefore the provisions of section 7 of the agency contract (R. 173-174) gave Cook a very large advantage not accorded to any other creditor. According to the petition of Van Tassel (R. 164) he had obtained that sort of a contract as the representative of R. E. Crummer & Company.

Section 8 of the contract (R. 174-175) obligates Cook to furnish the legal service of Joseph P. Lea, Jr. Mr. Lea was then and still is general counsel for R. E. Crummer & Company with headquarters at Orlando, Florida. Section 9 of the contract (R. 175) gives Cook the right to charge other bondholders such amounts as he and such other bondholders may be able to agree upon for the privilege of exchanging their old bonds for new bonds. In the plan attached to the city's petition (R. 23) the amount he was to charge was reduced to the definite sum of $20 per $1,000 or 2%. This was another advantage accorded to Mr. Cook and his principal R. E. Crummer & Company not accorded to other bondholders.

Section 10 of the contract (bottom R. 175) is in part the same as the plan defined by Section 8(A) (R. 21), namely that the city was to make such settlements on delinquent taxes for the years 1941 and preceding years, also delinquent special assessments, and thereby create a special fund for the specific purpose of purchasing re-

funding bonds from Cook and Crummer at specified percentages of par on an ascending scale—more special benefits. This scheme would operate to deprive general creditors of the town such as the petitioner Green of sharing in those assets as a means of satisfying their just general obligations against the city.

Section 11 of the contract (R. 176) undertakes to vest in Cook the authority to proceed with the formulation of a plan of composition and to proceed in the federal bankruptcy court and pay all costs and master's fees that might be incurred by the city. That section therefore clearly demonstrates that the plan proposed by the city was the Cook plan and not the city's plan. The fiscal agency contract plus other matters previously referred to clearly demonstrate that the city commissioners in effect "sold out" to Cook and Crummer. These are some of the things which intervening creditors and intervening taxpayers sought to show before the court.

On October 15th, 1942, as appears R. 178 to 183, counsel for Green, Turner and Newport Culvert Company moved to vacate the interlocutory decree of September 18th, 1942, on numerous grounds. Prior thereto on July 2nd, 1942, as appears R. 200. Pauline A. Selser, a taxpayer, had filed a petition showing that she had a suit pending for declaratory judgment to determine what property was subject to taxes by the City of Stuart and that the court should determine that matter before concluding the consideration of the petition for composition. On October 16th, 1942, all of the undisposed of motions and petitions came on to be considered by the court and a further decree was entered (R. 186 to 188) denying the petition of Green *et al.*, to vacate the former interlocutory decree of September 18th, and denying interrogatories propounded to Cook, denying intervention to Van Tassel, Selser and others on the ground that

> "such persons are not in any manner affected by this plan of composition, and that such persons do not

> own securities affected by this plan of composition and therefore are strangers to this proceeding and have no right to be heard herein, and that some of such persons are taxpayers and therefore have no right to intervene in this cause."

That particular order cleaned up the whole record leaving the city and Mr. Cook to complete the job as they saw fit without any interference by taxpayers or creditors who had not been listed as consenting creditors to the plan.

On the same date the court entered the final decree appearing R. 188-189 confirming the plan which had been proposed by the city and making it binding upon

> "all persons or corporations holding any of such bonds, coupons, or interest accruals thereon, or any claims thereon, however represented."

Appeal was taken from the interlocutory decree and final decree as appears R. 190-191. The Circuit Court of Appeals affirmed the decision of the court below as now appears by the report of *Green* v. *City of Stuart*, 135 F. 2d 33. The Court of Appeals agreed with the district court to the effect that although petitioners George W. Green and Newport Culvert Company were general creditors of the city they were not affected by the composition plan and therefore were not entitled to be heard. The Court of Appeals agreed also that neither taxpayers within the city proper nor those within the territory which had been excluded by the decisions of the Supreme Court of Florida, had any right to be heard. That they were not proper parties and therefore the district court correctly struck out and denied their petitions of intervention.

BASIS OF JURISDICTION.

The jurisdiction of this court is based upon Section 240, Judicial Code, Sec. 347, Title 28, U. S. C. A. Also upon Rule 38 of this court. Also upon 11 U. S. C. A., Sec. 47(c) (Pocket Supp., p. 175).

QUESTIONS PRESENTED.

QUESTION I.

Were Petitioners George W. Green and Newport Culvert Company Such Creditors of the City of Stuart As Were Severally Affected by the "Plan" of Composition Proposed by the City and Were They Severally Entitled to Contest the Material Allegations of the City's Petition for Confirmation of Such "Plan"?

We maintain that the courts below erred in answering this question in the negative. Chapter 14470, Laws of Florida, 1929, not only validated Green's claim against the city but declared that he was entitled to have same paid by general *ad valorem* taxes levied by the city. The Fifth Circuit Court of Appeals also upheld Green's claim and cited the Act of 1929 as authority. See *Green* v. *City of Stuart*, 81 F. 2d 968. The debt due to Newport Culvert Company, as described in its filed claim and answer, is of the same dignity. These two creditors are admittedly entitled to have the obligations they hold liquidated from the "same source or sources" as the bonds and judgments alleged to be affected by the plan. Therefore 11 U. S. C. A., Sec. 403(b) (Pocket Supp., pp. 87-88), gave them the specific right to file such claims and answers as they did file in this cause. It follows that the courts below erred in striking those claims and answers from the file and in denying them all right to be heard in this proceeding.

It has been held that all claims of creditors must be filed whether listed or not and whether liquidated or not.

Otherwise such claims will be barred by a composition decree. *Poinsett Lbr. & Mfg. Co.* v. *Drainage Dist. No. 7 of Poinsett County,* (8 C. C. A.) 119 F. 2d 270. 11 U. S. C. A., Sec. 403(a), mandatorily requires that

> "there shall be filed with the petition a list of all known creditors of the petitioner, together with their addresses so far as known to the petitioner, and a description of their respective securities."

Subsection (b) of the same section provides for a notice to all creditors. Subsection (e) of the same section defines the mandatory essentials for confirmation of the plan. First, that it must be fair and equitable and non-discriminatory as between creditors. That it had been accepted and approved by the requisite percentage of qualified creditors. That there have been no fraudulent practices and no bad faith and, lastly, that the petitioner

> "is authorized by law to take all action necessary to be taken by it to carry out the plan."

If any creditor of any class can point out any illegality in the proposed plan which would affect directly or indirectly his right or ability to have his debt liquidated then he is entitled to be heard.

QUESTION II.

Were George W. Green, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser et al., As Taxpayers, Some Within the Original Corporate Limits of the City and Some Within the Extended But Illegal Limits of the City, Severally Entitled to Intervene and Show That the "Plan" Because of Its Bad Faith, Its Unfairness, Its Waste of Public Funds and Its Illegalities Should Not Be Confirmed?

Both courts below answered this question in the negative.

It has long been settled that a taxpayer is entitled to equitable relief against corporate authorities to prevent waste of corporate assets or abuse of corporate power or

the making of illegal corporate contracts. *Crampton* v. *Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070. General Bankruptcy Order No. 37, 11 U. S. C. A., Sec. 53, p. 96, makes the Rules of Civil Procedure appliable in bankruptcy cases, Rule 24 entitled the taxpayers last above mentioned severally to intervene and point out the bad faith, unfairness, waste of public funds and illegalities which they severally have alleged in their petitions. *In re Willacy County, etc., District No. 1,* (D. C. Tex.) 36 Fed. Supp. 36. *Seaboard Terminals Corp.* v. *Western Maryland Ry. Co.*, 108 F. 2d 911, 42 Am Bankr. Rep. (N. S.) 106.

QUESTION III.

Was the Plan "Fair and Equitable" Either to Creditors Such As Green et al. or Taxpayers Such As Turner et al., When It Was Shown by the Answer of Green (R. 95) **That the Citizens' Committee Plan** (R. 98 to 108) **Would Have Accomplished a Refunding of the City's Debts for $500,000 Less Than the Cook-Crummer Plan** (R. 13-33)?

The answer of Green (R. 93) denies that the plan referred to in the city's petition was "fair and equitable" to him either as a creditor or a taxpayer and at R. 95 he charges that the proposed city plan will bring about an excess indebtedness of $500,000 more than the citizens' committee plan. The answer of Turner (Par. 4, R. 136) charges that the city has no ability to pay and perform. That the proposed plan will merely facilitate speculation by the fiscal agent Cook and prolong the city's defaults with a resultant depreciation of property values. The petition of Van Tassel (R. 165-167) also alleges that the plan would result in the levy of heavier taxes than had been collectible in the past and that the city had no present or prospective ability to pay according to the proposed plan. Also that

> "the plan is not fair to the taxpayers or its *bona fide* creditors, but only to provide a means whereby specu-

lators in its defaulted obligations and its fiscal agent can make a profit with no idea that the plan will succeed or stay out of default if confirmed."

The motions attacking these several answers admitted the truth thereof. Undoubtedly $500,000 difference in the debt burden to be carried materially affected all taxpayers. Such great difference in the two plans also lessened the ability to pay such creditors as Green and Newport Culvert Company. What justification can there be for such invasion of the rights of creditors and taxpayers for the benefit of speculators such as Cook and Crummer?

QUESTION IV.

Was the City "Authorized by Law to Take All the Action Necessary to Be Taken by It to Carry Out the Plan" When That Plan Was Contrary to Many Limitations of the City's Existing Charter?

The courts below and this court can take judicial notice of the city's charter so that it was not necessary to plead or prove the same, especially when its charter is represented by a special statute of the state.

The original statutory charter of the "Town of Stuart" was Chapter 7245, Laws of Florida, 1915. In 1925 Chapter 11214 was passed abolishing the Town of Stuart and purporting to create the "City of Stuart." Section 162 of that Act carried a referendum provision to the effect that same would go into effect upon majority vote of freeholders. There is some doubt as to whether a freeholders' election was properly called and held due to the decision of the Supreme Court of Florida in *State ex rel. Davis v. City of Stuart*, 97 Fla. 69, 120 So. 335, but irrespective of that question the court held that all territory embraced by the Acts of 1925 and within the City of Stuart lying north of St. Lucie River and harbor were unconstitutionally included within the city. By Chapter 11749, Laws of Florida, special session, November, 1925, the Legislature

undertook to validate $500,000 of bonds of the City of Stuart issued for specified purposes. Those are the same bonds involved in the proposed composition. Therefore provisions of the charter acts in force when the aforesaid bonds were issued became parts of the bond contracts.

In 1933 the Legislature passed Chapter 16692 abolishing the existing municipality of the "City of Stuart" and creating a new municipality of the same name, defining its boundaries and its powers. The result is that the Acts of 1933 plus the Act of 1925 will have to be examined to see whether or not the proposed plan runs counter to any prohibitions contained in said Acts. We think that the provisions of section 158 of said Chapter 16692 are fatal to the proposed composition plan here involved. That section of the Charter reads as follows:

> "Section 158. How issued—The City Commission, in its corporate capacity, is authorized to issue from time to time, bonds of said City, of such denomination and bearing such rate of interest, not exceeding six per cent, and becoming due in such time and upon such conditions as may be determined, *to an amount not exceeding in the aggregate fifteen per cent of the assessed value of the taxable real estate of the City at the time of issue;* provided, that no such bonds shall be issued except for the purpose indicated in Section 7-B, for the floating of the debt of the City, *refunding of previous issues of bonds,* establishment of public work and utilities, construction of necessary municipal buildings, and for the improvement of parks, highways and streets, and other municipal purposes as are of general benefit in their relation to the municipality; provided, further, that before the issue of any such bonds shall be made *an ordinance shall be passed expressing in exact terms the amount of the contemplated bond issue and the purpose for which moneys so to be realized are to be used,* which said ordinance proposing the issue of bonds *shall subsequently be approved by a majority vote of the electors of the City,* who are qualified to vote as shown by the registration and tax books of the

City, who vote thereon, at an election held for that purpose, at such time and in such manner as may be prescribed by law and the City ordinances. *No person shall be demed qualified to vote at such election who does not own and pay taxes on real property located in the City.* The question of the issuance of bonds for any specified purpose may be submitted from time to time not oftener than once each year with relation to each purpose specified" (Italics ours).

Section 206 of the charter act of 1933 makes the general laws of the State applicable

"which are not in conflict with the provisions of this Act."

The general refunding Act of 1931 is relied upon and mentioned in the proposed plan. Nevertheless the charter Act of 1933 is later in point of time and being a special act would control where in conflict with the general laws. *City of Apalachicola* v. *State,* 93 Fla. 921, 112 So. 618. The italicized portions of the foregoing section 158 are important. The record here shows a proposal to refund bonds to the amount of $1,107,000, whereas the assessed value of all taxable property in the city according to the *ex parte* affidavit of the City Clerk (R. 150-152) was $1,754,423. The 15% limitation, according to the language of section 158, applies in express terms to

"refunding of previous issues of bonds."

Other limitations contained in the above quoted section are that an ordinance shall have been passed by the city commission expressing in exact terms the amount of the contemplated bond issue and the purpose for which moneys so to be realized are to be issued. The petition for the composition fails to show the passage of any such ordinance. Another limitation is that the proposed issue of bonds shall have been approved by a majority vote of resident taxpayers owning and paying taxes on real property located in the city. This limitation also applies to

the issuance of refunding bonds and the petition for composition wholly fails to show that any such condition was complied with. The Bankruptcy Act, 11 U. S. C. A., Sec. 403(e)(6), is merely an enabling act extending the benefit of bankruptcy to public utilities and does not purport to create power in any municipality where not existing under local law. Section 158 of the present city charter was included in the charter for the benefit of taxpayers generally, yet all of the answers and petitions of taxpayers were summarily stricken by the courts below.

QUESTION V.

Was the City "Authorized by Law" to Carry Out the Plan When the Provisions of Section 8 of the Plan (R. 21-22) **Violated Sundry Sections of the City's Charter of 1925 and of the City's Charter of 1933?**

Sections 110, 111, 112 and 113 of Chapter 11214, Laws of Florida, 1925, authorized the city to levy special assessments on property specially benefitted for the construction of "sewers, seawalls and drains," "streets," "side walks," and "gutters, etc." Section 119 of said Act provided for the issuance of improvement bonds based on such special assesments in the manner provided for by Chapter 6864, Laws of Florida, 1915—a general act. Chapter 11749, Laws of Florida, special session, November, 1925, shows that the outstanding bonds here in question are in large part such special improvement bonds. Exhibit B to the petition (R. 24-25) shows the same thing. Section 51 of the charter Act of 1925 provides:

> "Sec. 51. Moneys Received on Account of Special Assessments.—All moneys received on account of any special assessment shall be held by the City Treasurer as a special fund from which payment shall be made only on account of the improvement for which such assessment was made or security issued therefor and such money shall be used for no other purpose whatsoever."

The restrictions of this section were for the benefit of general taxpayers and became part of the improvement bond contracts, yet Section 8 of the plan (R. 21, 22) proposes to wholly ignore said charter limitation.

Sections 137 to 157 inclusive of Chapter 16692, the said charter act of 1933, contain provisions for special improvements and the issuing of bonds against special assessments substantially equivalent to the aforesaid provision of the said charter Act of 1925. Section 68 of said charter Act of 1933 was substantially the same as the above quoted Section 51 of the charter Act of 1925. However Exhibit B to the petition (R. 24, 25) shows that none of the bonds here in question were issued after the charter Act of 1933. Therefore we take it that Section 51 of the charter Act of 1925 would control.

In the case of *City of Winter Haven* v. *Summerlin,* 114 Fla. 727, 154 So. 863, 865, the Supreme Court of Florida held that such special assessments constitute a "statutory trust" and that

> "any taxpayer * * * who asserts a beneficial interest in the faithful execution of the statutory trust, may maintain a suit cognizable in equity for an accounting with reference to such statutory trust."

Neither the charter Act of 1925 nor the charter Act of 1933 gave to the city any authority to compromise at will either delinquent taxes or delinquent special assessments nor could the city in the face of Section 51 of the charter Act of 1925 divert special assessment collections either to new improvements or to the purchase of refunding bonds under terms specified in section 8 of the plan. Section 7-B of the charter Act of 1933 provides that general taxes and special assessments shall remain liens

> "against the land assessed until paid."

Also, that no statute of limitations shall apply with respect to the same. Likewise Section 105 of the charter

Act of 1933 provides that taxes and assessments shall remain a lien until paid, yet section 8 of the plan proposes to allow the city to compromise and cancel out both delinquent taxes and special assessments at any price that may be agreed upon between the city and the individual taxpayers and then divert the proceeds to the purchase of refunding bonds from the fiscal agent Cook at prices greatly enhanced over what he paid therefor. According to section 8 of the plan he proposes to sell them back to the city at prices ranging from 35% to 60% of par, whereas it is alleged in the answer of Newport Culvert Company (R. 132)

> "That the fiscal agent in this case is a bond speculator and represents bond speculators. That the alleged creditors he represents in many cases paid 10c flat in nominal sums for their claims, and the real investing creditors have not consented to his plan because they know it will not stand up, that all he wants, and those he represents, is to refund this debt for the greatest amount of paper principal possible with the hope and knowledge it will default after they have unloaded the so called compromise securities on the public, and in order they can again make fees for refunding."

QUESTION VI.

Was the Plan Either "Fair and Equitable" to Petitioning Creditors and Taxpayers or Was the Plan "Authorized" by the City's Charter When It Was Proposed to Convert into Interest-Bearing Bonds All Noninterest-Bearing Coupons and "Other Interest" But to Allow the Holders of 25% in Amount of Refunding Bonds to Cause a Reverter to the Old Interest Rate of 6% upon Any Default by the City Occurring, Such Refunding Bondholders However to Retain All Interest-Bearing New Bonds Issued for Noninterest-Bearing Coupons and "Other Interest"?

The 1925 charter of the city and Chapter 6864 relating to special improvement bonds, adopted thereby, did

not give the city any power to pay interest on bonds after maturity or to pay interest on overdue coupons. Those statutes became part of the bond contracts here involved. In the case of *State ex rel. Fieldhouse* v. *Sewell, Mayor of the City of Miami, et al.*, 126 Fla. 498, 171 So. 298, 9th headnote and supporting text, the Supreme Court of Florida held that mandamus would not be granted to compel levy and assessment of taxes

> "to procure funds with which to pay interest accruing on bonds after maturity * * * the statute under which the bonds were issued does not appear to require payment of interest on the bonds after maturity. Therefore the interest, the payment of which is sought to be provided for, is an item not within the contract and may not be enforced by mandamus."

The Cook-Crummer plan attached to the city's petition provided for the issuance to R. E. Crummer of interest bearing refunding bonds (R. 26) for $64,390 of the past due coupons drawing no interest and $21,914.49 of "other interest," accrued on what we do not know. The plan proposed to do the same thing for all of Mr. Gleason's past due coupons aggregating $66,430 (R. 43-45). The same thing was to be allowed for E. W. Jackson's $35,-679.69 past due coupons and $2,570 "other interest" (see R. 49 to 50). Interrogatories to Cook sought to show that Gleason and Jackson were merely employees of Cook, the fiscal agent, but the court disallowed those interrogatories. Section 6(f) of the plan (R. 18) would give to Cook and Crummer the option on the city's failure to perform any covenant to revert the new bonds to the old interest rate of 6% but no provision was made to surrender any new interest bearing bonds to be issued for noninterest bearing coupons or "other interest." Thus the total debt of the city would be greatly increased rather than compromised. These results would violate Section 158 of the charter of 1933, quoted pages 20-21, *supra*, and would violate Section 6, Article IX, of the Florida Con-

stitution requiring the approving vote of freeholders if there be such increase in the taxing unit's indebtedness. *Taylor* v. *Williams*, 142 Fla. 402, 195 So. 175, 12th and 13th headnotes. *City of Fort Myers* v. *State*, 129 Fla. 166, 176 So. 483, 5th headnote and supporting text.

QUESTION VII.

Was the District Court Authorized to Confirm the Plan Without Any Specific Findings As to the City's Ability to Perform and Carry Out the Plan and Without Any Investigation or Findings As to What Property Was Subject to Taxation, Especially When These Petitioners Had by Their Pleadings Sought to Put Such Matters in Issue?

The courts below answered this question in the affirmative. The district court did so by striking out all the answers and petitions which sought to raise such questions and then proceeded to enter the *ex parte* decree found R. 155 to 163. It will be noted that the decree was signed on the same day that the affidavit of the City Clerk (R. 150) was filed and on the same day that the affidavit of Thomas M. Cook (R. 152) was filed. We apprehend that counsel for R. E. Crummer & Company had previously prepared the decree before the hearing at Tampa on the 18th of September. Be that as it may the decree does not measure up to the requirements of the Bankruptcy Act as expounded by this court in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 520-525, 85 L. Ed. 982, 990, 993, and *Kelley* v. *Everglades Drainage District*, decided June 1st, 1943, 87 L. Ed. (adv.) 1091. Under Question No. V stated page 22, *supra*, we pointed out that all improvement bonds have a special claim and security against special assessments which constitute a "statutory trust." If that security proves to be insufficient, holders of improvement bonds may nevertheless require the city to levy a general *ad valorem* tax to meet such obligations. *Klemm* v. *Davenport*, 100 Fla. 627, 129 So. 904. On the other hand, holders of judgments or other

debts against the city have no such special security and must depend upon their right to compel the city to levy general *ad valorem* taxes for payment of their claims. This presents a situation quite analogous to that involved in the Consolidated Rock Products Company case where one set of bondholders were secured by mortgaged assets and other creditors were not so secured. In the instant case the decree of the district court did not pretend to make any findings as to the value of the uncollected special assessments or to what extent the holders of improvement bonds would have to resort to their general right to require *ad valorem* taxation. Neither was there any attempt to determine or make any finding as to what property of the city was subject to general *ad valorem* taxation. For instance, in 1937 the Legislature passed Chapter 18296, known as the Murphy Act, for the purpose of permitting owners or others to clean up old delinquent state and county taxes. Section 9 of that Act provided that if no affirmative action was taken by owners or others during a two year period defined by the Act then the absolute title to such delinquent lands reverted to the state. The bill for declaratory decree by Pauline A. Selser, one of the intervening petitioners here, showed that had occurred to a large extent in the area claimed to be within the jurisdiction of the City of Stuart. No finding or account was taken of that situation by the interlocutory decree entered in the instant case.

Again the Supreme Court of Florida in *State* v. *City of Stuart*, 97 Fla. 69, 120 So. 335, pointed out that under Chapter 7245, Acts of 1915, the "Town of Stuart" had an area of about 640 acres, whereas, under the extended limits defined by Chapter 11750, Laws of Florida, extra session, 1925, the area was increased to about 9,460 acres or about fifteen times the original area under the Act of 1915. The court held that the Acts of 1915 extending the area were in violation of the Florida Constitution because

no municipal benefits were extended to the large area and no prospect of any. Nevertheless by the Charter Act of 1933, namely, Chapter 16692, Section 6, the boundaries of the city were redefined and the area as there redefined embraced about 2,800 acres, thus excluding a large part of the same territory which was excluded by the decision of the Supreme Court of Florida but including much which that decision held should also remain excluded. The petition of intervention by Pauline A. Selser and others in this case set forth that they had pending before this proceeding was instituted a bill for declaratory decree to determine whether their lands in the light of the decision of the Supreme Court of Florida should be regarded as in or out of the City of Stuart. The district court refused to permit such intervention and also refused to permit the suit for declaratory decree to be consolidated with this proceeding. A petition for certiorari is now pending before this court in the Selser case which should be regarded as part of this same litigation. In any event the decision of this court in the Kelley case clearly shows that it was incumbent on the district court to determine what property of the City of Stuart was subject to taxation and what revenue was reasonably to be expected therefrom, *before any decree was entered confirming the plan.* Until the court had made adequate and specific findings in that behalf the statement in the decree that the plan was "fair and equitable" was an unsupported conclusion. In the Kelley case this court held that the principles laid down in the Consolidated Rock Products Company case and in railway reorganization cases are applicable to municipal bankruptcy cases and that the same sort of findings must be had in all such cases before there is any confirmation of the plan. In the Kelley case this court among other things said:

> "Where future tax revenues are the only source to which creditors can look for payment of their claims, considered estimates of those revenues con-

> stitute the only available basis for appraising the respective interests of different classes of creditors. * * * The court must have before it data which will permit a reasonable, and hence an informed, estimate of the probable future revenues available for the satisfaction of creditors."

On the same subject, supporting the third headnote, the court further said:

> "Appropriate facts which might have been considered, but which are nowhere referred to in the opinions or findings below, are the revenues which have in the past been received from each source of taxation, the present assessed value of property subject to each tax, the tax rates currently prescribed, the probable effect on future revenues of a revision in the tax structure adopted in 1941, the extent of past tax delinquencies, and any general economic conditions of the District which may reasonably be expected to affect the percentage of future delinquencies."

The decree of the district court in the instant case wholly fails to measure up to any of these requirements. On the contrary the district court struck out every answer, petition or pleading which was interposed by these petitioners either as creditors or property owners attempting to bring about just such investigations and findings.

Under Question V, page 22, *supra,* we pointed out that Section 8 of the proposed plan confirmed by the court below undertakes to authorize adjustments of delinquent taxes and that includes alleged delinquencies on all the area ever claimed to be within the city limits including the whole of the 9,460 acres referred to by the Supreme Court of Florida in *State* v. *City of Stuart, supra.* The bill for declaratory decree filed in the Selser case shows that the properties owned by the plaintiffs in that case are outside, or at least some of them are, the present city limits as defined by the charter Act of 1933 but were within the special act, extra session of 1925. Therefore

all such taxpayers are directly affected by the proposed plan, especially as regards such alleged delinquent taxes, and yet the court below refused to permit them to intervene and refused to make any inquiry as to what lands were properly subject to taxation or what revenue could reasonably be expected to flow therefrom.

It is only fair to say that this court's decision in the Kelley case was handed down on June 1st, 1943, whereas the opinion of the Court of Appeals in this case was handed down on April 29th from the rehearing denied May 31st, 1943. If the decision in the Kelley case had already been published the decisions of the courts below would undoubtedly have been different.

QUESTION VIII.

Was It Competent for the District Court to Confirm the Plan When Illegal Favoritism Appeared on the Face of the Plan and When "Fraudulent Practices" on the Part of the Fiscal Agent Cook (Representative of R. E. Crummer & Company) Were Shown by the Petitioners' Pleadings and the Contract Attached to the Petition of Van Tassel?

(R. 167 to 177.)

The Bankruptcy Act as amended June 28th, 1940, 11 U. S. C. A., Sec. 403(e) (Pocket Supp. 88), made it the mandatory duty of the district court to guard against "fraudulent practices." The evil of such practices had been shown in the hearings before the congressional committees with respect to H. R. 8016. Those hearings developed the evil methods which had been employed by R. E. Crummer & Company and others. The court may take judicial notice of those hearings. Those hearings were on "Municipal Bankruptcy Compositions" and dealt with H. R. 8016, February 14th, 15th and 16th, 1940. At pages R. 1 and 2 will be found H. R. 8016, the passage of which was urged by the officers and attorneys who appeared before the committee on behalf of R. E. Crum-

mer & Company. They did not get what they wanted. On the contrary the testimony and data produced before the committee by F. G. Janes, Jr., of Wauchula, Florida, F. L. Revell, of Wauchula, Florida, W. Terry Gibson, of West Palm Beach, Florida, and Giles J. Patterson, of Jacksonville, Florida, caused H. R. 8016 to be amended and reintroduced as H. R. 9139. The latter bill was adopted. As a result of those hearings said sub-section (e) became part of the law and requires that the court shall carefully investigate all contracts and related matters for the purpose of ascertaining whether the

> "fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such a nature, has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof, or any of such creditors—either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue—and shall take evidence under oath to make certain whether or not any such practice obtains or might obtain."

The Act then further provides:

> "After such examination the judge shall make an adjudication of this issue, as a separate part of his interlocutory decree, and if it be found that such practice be possible, he shall forthwith dismiss the proceeding * * * If it be found that no such practice is possible, then the judge may proceed to further consideration of the confirmation of the plan."

These paragraphs of the Act are so imperative that the district court is required to make a separate and prior determination on this matter of fraudulent practices. That requirement was not complied with in the instant case.

The proposed plan and the decree itself show that Cook was being compensated or benefited both by the city and by other creditors, also that he was undertaking

to act in a dual capacity for the city and as representative of other creditors. On the face of the plan and the decree he had these benefits at stake from the city's side of the transaction:

(a) He owned at least $100,000 of old bonds or non-interest-bearing coupons (R. 22) which were to be exchanged for interest-bearing refunding bonds.

(b) He was granted the privilege of reselling his new bonds to the city and to exclusively receive in exchange therefor the proceeds of delinquent taxes and delinquent special assessments diverted from the "statutory trust" theretofore created.

(c) He had probably bought his old bonds and coupons at 10c on the dollar like many other creditors he represented (R. 132) and yet he was privileged to sell back to the city refunding bonds exchanged therefor at from 35c to 60c on the dollar (R. 21).

(d) He was given the exclusive privilege of collecting 2% or $20 for each $1,000 of old bonds exchanged by other bondholders irrespective of whether such other bondholders surrendered their old bonds for exchange voluntarily or involuntarily pursuant to the court's decree. Under this last heading he was deliberately given the right to traffic and profit on the processes of the court.

On the creditors' side of the picture he had these things at stake:

(a) He was allowed to vote the bonds of those creditors he represented, for the plan (See par. (e), R. 158, and par. (f), R. 161, of the decree).

(b) The other creditors would be required to pay him for services to be rendered to them in and about the consummation of the plan 2% on the amount of their old bonds exchanged either voluntarily or involuntarily.

As heretofore pointed out, the *ex parte* affidavit of Cook filed with the court at Tampa on September 18th

(R. 153) referred to the fiscal agency contract with Cook but for some reason the contract did not show up either with the affidavit of Cook or with the affidavit of the City Clerk (R. 151). A copy was attached to the petition of Van Tassel subsequently filed October 9th, 1942 (R. 167 to 177). That contract confirmed all the vices already disclosed by the plan and the decree as above noted and added other vices. For instance, as appears by the sentence beginning middle R. 171, the city undertook to confer upon Cook and the creditors he would represent an earmarking or first lien so to speak upon all the taxes which the city might thereafter levy for its bonded indebtedness. Under the plan the city's power to collect *ad valorem* taxes was to be completely loaded and in fact over-loaded for the refunding bonds to the exclusion of other creditors and he, Cook, as a speculator in bonds would capitalize on that alleged promise in his contract as a means of aiding him to unload at favorable prices such refunding bonds as would be issued to him and his relative R. E. Crummer and the company he represented, to-wit R. E. Crummer & Company. Again, section 7 of his contract (R. 173, 174) expressly undertook to authorize Cook, the fiscal agent of the city, to go out and speculate on the city's securities and in that way again acquire large benefits from the plan he was promoting. By virtue of the contract and the proposed plan Cook was put in the most advantageous position of any creditor and therefore other creditors with whom he was authorized to negotiate were at a great disadvantage. Again, sections 8, 9 and 10 of the Cook contract were void for the reason that they were contrary to public policy and violated the terms of the city's charter of 1933. For instance, Section 27 of Chapter 16692, Laws of Florida, 1933, the last city charter of the City of Stuart, required the appointment of a city attorney who should be the legal advisor of the city and all its officers

> "in matters relating to their official duties. He shall prepare all contracts, bonds and other instruments in

writing in which the municipality is concerned and shall endorse on each his approval of the forms and correctness thereof and no contract with the municipality shall take effect until his approval is so endorsed thereon."

The contract with Cook contained no such endorsement. On the contrary, the contract proposed to have Mr. Cook and Mr. Joseph P. Lea, Jr., have complete charge of the refunding program and whatever was necessary to be done in the bankruptcy court. The contract also undertook to delegate official authority.

It is thus seen that the scheme disclosed by the plan, the decree and the contract, plus facts alleged in the stricken answers and petitions contained all the vices condemned by this court in *American Union Mutual Life Ins. Co.* v. *Avon Park*, 311 U. S. 138, 85 L. Ed. 91, 136 A. L. R. 870, and in *Woods* v. *City National Bank and T. Co.*, 312 U. S. 262, 268-269, 85 L. Ed. 820, 825-826. The Supreme Court of Florida has also held such practices fraudulent and void in *Taylor* v. *Williams* and *W. J. Howey Company* v. *Williams*, cited in the *Avon Park case*, 311 U. S. 149, 85 L. Ed. 97. Those decisions of the Supreme Court of Florida were followed by the Tenth Circuit Court of Appeals in the case of *City of Vero Beach* v. *Rittenoure Inv. Co.*, 113 F. 2d 269. The court in that case quoted at length from *Taylor* v. *Williams* in condemning the fiscal agency contract sought to be enforced by the City of Vero Beach, Florida. Quite lately the Fifth Circuit Court of Appeals in the case of *Bradford County, Florida*, v. *Nuveen et al.*, 133 F. 2d 169, condemned such a fiscal agency arrangement as being utterly void and unenforceable and the court followed and applied *Taylor* v. *Williams* and *Howey Company* v. *Williams*. Also the decision of the Tenth Circuit in the City of Vero Beach case.

QUESTION IX.

Was the Plan Accepted and Approved by Qualified Creditors Holding Two-Thirds of the Debts Affected?

QUESTION X.

Was the Offer and Acceptance of the Plan in Good Faith?

The matters and things referred to under Question VIII above show that both of these questions should have been answered in the negative. Furthermore, the facts alleged in the pleadings of the petitioners and admitted by the attacking motions also clearly showed that Qpestions IX and X should have been answered in the negative. By striking all the pleadings of the petitioners and by denying all interrogatories propounded by petitioners the courts below refused to inquire as to what creditors Thomas M. Cook actually represented and as to what they paid for their bonds and past due coupons. The courts below also refused to make such inquiries as might have developed whether or not the bonds and coupons Cook claimed to own or control could be properly voted for the plan. The court refused to permit inquiry as to whether Gleason and Jackson were mere employees of Cook. Also whether, as alleged, Cook was the mere representative or dummy of R. E. Crummer & Company. The decision of this court in the Avon Park case shows that all of these matters were pertinent and that the confirmation of the plan is not sustained by the present record.

QUESTION XI.

Did the District Court As a Court of Bankruptcy Have Exclusive Jurisdiction and Power to Consider and Determine All Questions Relating to the Proposed Plan of Composition, Including What Property Was Subject to Ad Valorem Taxation and Whether the Proposed Refunding Bonds Would Be Valid and Unenforceable Obligations?

The decision of the Supreme Court of Florida in *State v. City of Stuart*, 97 Fla. 69, 120 So. 335, shows that the

"Town of Stuart" like thousands of other similar communities became financial wrecks on account of the wild speculative land boom which swept throughout the country in the year 1925. The area of the town was increased some fifteen times and remote rural lands, said the Supreme Court, were valued at as much as $1,000 per acre. All of the bonds here in question or nearly all were issued in that year to promote boom-time improvements. The new "City of Stuart" was insolvent from the time said bonds were issued and certainly has remained so ever since the decision of the Supreme Court in *State* v. *Stuart* decided in January, 1929, declaring that the special acts, increasing the area to fifteen times the original size, were void. The hearings and debates in congress show that Chapter 9 of the Bankruptcy Act as now amended was enacted for the purpose of enabling a bankruptcy court to salvage such municipalities and taxing entities from financial wreckage brought about largely by the boom of 1925. To that end the amendment to the Bankruptcy Act now known as Chapter 9 undertook to vest in the bankruptcy court plenary power to do all things necessary to salvage such financially wrecked taxing entities utilizing and conforming however to such basic rights and capabilities as were conferred upon such taxing entities by the local laws of the respective states. When the City of Stuart and the alleged consenting creditors brought this proposed plan into court they thereby conceded that the financial affairs of the City of Stuart had broken down completely and that only a court of bankruptcy could furnish a solution. In order to find a solution it was necessary for the bankruptcy court to analyze the liabilities and the resources of the city and in doing so to make such investigations and findings as are set forth in *Kelley* v. *Everglades Drainage District*, quoted pages 28-29, *supra*. The opinion of the Court of Appeals rendered in this case contends that the bankruptcy court had no authority to make any inquiry as to what lands or property are subject

to taxation and holds that the Act did not purport to confer any jurisdiction upon the court for any such purpose. In the companion case of *Selser et al.* v. *City of Stuart,* now before this court on certiorari, and reported 135 F. 2d 211, the Court of Appeals held that such contention about what lands were and what were not subject to taxation by the City of Stuart was a collateral attack upon the corporate existence of the city and in any case such question could be answered only in a quo warranto proceeding brought in the name of the State in a state court of competent jurisdiction. In short, the holding was that the bankruptcy court must hands off. That it can only do part of the job in the consideration and confirmation of an adequate plan of composition and refinancing.

Likewise the Court of Appeals in this case approved the ruling of the district court whereby the district court refused to strike the decree of the state court entered in a validation proceding instituted after this suit was instituted purporting to validate refundng bonds that were to be issued pursuant to the plan proposed in this case (see motion to strike the validation decree, R. 184, and order thereon, R. 18). In other words, the courts below held that the state court could properly take jurisdiction by validation suit of the very subject matter which was to be authorized by a decree of confirmation in this bankruptcy proceeding. That view is inconsistent with the terms of what is now Chapter 9 of the Bankruptcy Act and is inconsistent with other federal cases applying the same. In the *Avon Park case,* 311 U. S., text 146, this court gave sundry examples of the range and type of power which a court of bankruptcy in a proceeding such as this might exercise. Said the court:

> "that power is ample for the exigencies of varying situations. It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy."

This interpretation is consistent with many prior decisions dealing with other parts of the Bankruptcy Act which entitle a court of bankruptcy to enjoin all pending suits of whatsoever nature in other courts, state or federal, which may affect the subject-matter involved in the bankruptcy proceeding. The bankruptcy court does not divide its jurisdiction and authority with any other court whatsoever. The same view was taken by the Eighth Circuit Court of Appeals in the case of *Board of Directors of St. Francis Levee Dist.* v. *Kurn*, 98 F. 2d 394 (see 4th, 9th, 10th and 12th headnotes and supporting text). In that case the bankruptcy court enjoined the prosecution of suits by the levee district in another state brought against the railroad company then involved in a proceeding under section 77 and held that the bankruptcy court was the appropriate forum for adjudication of

> "the amount and validity of the tax liens and foreclose them."

So here the validity of the proposed refunding bonds would in a large measure depend upon whether the plan was legal when tested by the Bankruptcy Act and whether the fiscal agency contract was valid when tested by bankruptcy law and state law. Therefore it was incompetent for the state court while the bankruptcy proceeding was pending to invade the jurisdiction of the bankruptcy court in undertaking to validate the proposed refunding bonds which had not yet been authorized by a decree of the bankruptcy court.

REASONS FOR ISSUANCE OF CERTIORARI.

1. *The interlocutory and final decrees entered by the district court were contrary to sundry provisions of the charter of the City of Stuart and contrary to section 6, article IX, of the State Constitution.*

2. *The decrees of the district court relating to the plan of composition and the decree of the Court of Appeals*

affirming the same are in conflict with applicable and pertinent decisions of the Supreme Court of Florida cited in the foregoing pages of this petition. Namely, *State* v. *City of Stuart,* 97 Fla. 69. *City of Winter Haven* v. *Summerlin,* 114 Fla. 727. *State* v. *Sewell,* 126 Fla. 498. *Taylor* v. *Williams,* 142 Fla. 402. *City of Fort Myers* v. *State,* 129 Fla. 166.

3. *The decrees of the courts below are in conflict with decisions of this court rendered in cases heretofore cited in this petition.* Namely, *Crampton* v. *Zabriskie,* 101 U. S. 601. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510. *American Union, etc., Ins. Co.* v. *Avon Park,* 311 U. S. 138. *Woods* v. *City National B. & T Co.,* 312 U. S. 262. *Kelley* v. *Everglades Drainage Dist.,* 87 L. Ed. (adv.) 1091.

4. *The decisions and decrees of the courts below are in conflict with decisions of other circuits dealing with similar questions of law.* Namely, *Poinsett Lbr. & Mfg. Co.* v. *Drainage Dist.,* (8 C. C. A.) 119 F. 2d 270. *Seaboard Terminals Corporation* v. *Western Maryland Ry. Co.,* (..... C. C. A) 108 F. 2d 911. *City of Vero Beach* v. *Rittenoure Inv. Co.,* (10 C. C. A.) 113 F. 2d 269. *Board of Directors of St. Francis Levee Dist.* v. *Kurn,* (8 C. C. A.) 98 F. 2d 394.

5. *This case calls for a construction and application of important parts of Chapter 9 of the Bankruptcy Act which have not heretofore been fully and completely construed and applied by this court. Such matters are therefore matters of great public importance which are deserving of decision in this case.*

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this court for its review and determination on a day certain to be named therein a full

and complete transcript of the record and proceedings in the case docketed in that court as Number 10541 and entitled *Green et al.* v. *City of Stuart*, and that the judgment and decree of said Circuit Court of Appeals in said cause be reversed by this Court and that petitioners may have such other and further relief in the premises as to this Court may seem meet.

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